IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-978

E. I. DUPONT DE NEMOURS AND COMPANY, *et al.*, *Petitioners,*

v.

RUSSELL E. TRAIN, Administrator of the Environmental Protection Agency, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMERICAN IRON AND STEEL INSTITUTE AS AMICUS CURIAE

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INTEREST OF AMERICAN IRON AND STEEL INSTITUTE

American Iron and Steel Institute ["AISI"] is a non-profit trade association, incorporated under the laws of the State of New York, with principal offices at 1000 16th Street, NW, Washington, D.C. AISI's member companies employ over one-half million people and produce approximately 95 percent of the steel made in the United States.

The issues presented in this case are virtually identical to issues presented and decided in an action

brought by AISI in the United States Court of Appeals for the Third Circuit challenging the "effluent limitations guidelines" for the steel industry. *AISI v. EPA*, 526 F.2d 1027 (3d Cir. 1975). That case is one of those which Petitioners cited as creating a conflict among the circuits on the issues raised in their petition for certiorari.[1] The Court's decision will determine how AISI's members will be regulated under the applicable sections of the Federal Water Pollution Control Act Amendments of 1972 ["the Act"],[2] and determine whether the Third Circuit had jurisdiction over the *AISI v. EPA* case.

This brief is being filed with the consent of the parties to this case.[3]

SUMMARY OF ARGUMENT

A. Jurisdiction To Review These Regulations Lies In The Court of Appeals

Judicial review of "effluent limitations guidelines" is conferred on the courts of appeals by section 509(b)(1)(E) of the Act, which applies to "Review of the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 301. . . ." Although the Administrator is not empowered by section 301 to issue effluent limitations, he in fact did so and the courts of appeals have jurisdiction to determine whether he acted within his statutory authority.

Moreover, the Administrator also relied upon section 304(b). This reliance is another source of jurisdic-

[1] Petition for Certiorari (January 9, 1976) at 17.

[2] 33 U.S.C. § 1251 *et seq.* (Supp. II 1972). References herein to the Act will refer to sections of the Act itself, rather than to the corresponding sections in the United States Code.

[3] The written consents are filed herewith.

tion in the courts of appeals. Section 509(b)(1(E) does not expressly refer to section 304(b), but it does refer to section 301(b) which expressly incorporates section 304(b). Since the promulgation of section 304(b) guidelines is a major national regulatory action under the permit program, the most logical reading of the Act is that judicial review of section 304(b) guidelines lies in the court of appeals because other similar actions, and actions based on the guidelines, are reviewed there. The importance of guidelines supports the interpretation that the above-quoted references to section 301 incorporates the section 304(b) guidelines.

Furthermore, the court of appeals below had pendent jurisdiction to review the regulations while reviewing challenges to the accompanying new source performance standards for the same industry. These standards were based on the same administrative record from which the regulations for existing sources were formulated.

B. The Administrator Is Not Authorized To Issue Single-Number Effluent Limitations

Section 301 of the Act does not grant to the Administrator the power to promulgate effluent limitations. The absence of an express grant of power is significant because when Congress wanted the Administrator to establish limitations of any sort under the Act, it expressly commanded him to do so and also specified the timetable and procedures to be followed.

Power in the Administrator to issue rigid single-number effluent limitations should not be implied because that power would upset the Federal-State relationship conceived by Congress. Section 101(b) of the Act expresses Congress' goal of placing the "primary responsibilities" to control water pollution with the

States. This goal was to be carried out by empowering the Administrator to issue "precise" national *guidelines* for the permit grantors to apply to individual plants under the Act's permit program. These guidelines were intended to provide meaningful guidance to the permit grantors, enabling them to deal with the innumerable differences that exist among plants in a nationally uniform way. Congress intended the permit programs to be "uniform" in treating *similar* plants in a *similar* way. This process requires the permit grantors to recognize significant differences among diverse plants, not ignore them. In one fell swoop the Administrator has issued single-number effluent limitations which reduce the permit grantors to helpless scriveners and give them no guidance on how to deal with industrial diversity on a nationally uniform basis. The Administrator exceeded his statutory authority when he issued these regulations.

However if any power relating to effluent limitations is to be found under section 301, it must be found by implication rather than by express statutory language. If any such implied power is to be found in section 301, it should not be the power claimed by the Administrator, which would have the effect of destroying the express logic and scheme of the remainder of the Act.

C. The Administrator Has Evaded His Duty To Publish Section 304(b) Guidelines

While claiming implied authority to issue limitations under section 301, the Administrator has simultaneously ignored the express statutory command of Congress to "publish . . . regulations providing *guidelines* for effluent limitations . . ." Section 304(b).[4] The Administrator's interpretation of the Act leaves no room for such guidelines. Yet the legislative history of the Act shows that Congress intended the guidelines to provide nationally applicable ranges of effluent limitations for categories within industries. The guidelines were also supposed to provide guidance to the permit grantors on how to determine where within the range the limitations for a particular plant should fall.

[4] All emphasis herein has been supplied unless otherwise indicated.

The Administrator has publicly admitted that Congress intended differences among plants within a category to be recognized in the permit program. However, his make-shift attempt to implement this objective through a limited "variance clause" does not comply with the Act. The "variance clause" provides no guidance to the permit grantors on how to adjust effluent limitations in light of differences among plants within a category or subcategory. In fact, it gives no guidance whatever. Instead, it establishes a norm of rigid adherence to the Adminstrator's single-number effluent limitations and an exception for plants which are "fundamentally different." But the Administrator does not explain what makes a plant "fundamentally different" nor what criteria a permit grantor should use to apply effluent limitations to such a plant. Thus the "variance clause" does not remedy the Administrator's failure to comply with his duty to publish guidelines under section 304(b) of the Act.

ARGUMENT

I.

JURISDICTION TO REVIEW THESE REGULATIONS LIES IN THE FEDERAL CIRCUIT COURTS OF APPEALS UNDER SECTION 509(b)(1)(E) OF THE ACT.

On March 12, 1974, EPA promulgated "effluent limitations guidelines for existing sources and standards

of performance for new sources for the inorganic chemicals manufacturing point source category. 39 Fed. Reg. 9612 (March 12, 1974). Amicus submits that section 509(b)(1)(E) of the Act confers original jurisdiction on the courts of appeals to review the "effluent limitations guidelines."[5] This grant of jurisdiction is exclusive. *Whitney Nat'l Bank* v. *Bank of New Orleans and Trust Co.*, 379 U.S. 411, 420-22 (1965).

Section 509(b)(1) provides:

> (b)(1) *Review of the Administrator's action* (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) *in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306,* and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

[5] There is no dispute concerning the jurisdiction of the courts of appeals to review standards of performance for new sources issued under section 306 of the Act. Jurisdiction to review such regulations is conferred by section 509(b)(1)(A).

A. Jurisdiction Lies In The Courts Of Appeals Under Section 509 (b)(1)(E) Because, Rightly Or Wrongly, The Administrator In Fact Issued Effluent Limitations Relying Upon Section 301 For His Authority.

The Administrator at the time of promulgation purported to rely upon section 301 for the authority to issue these regulations. 39 Fed. Reg. 9612 (March 12, 1974). He has consistently thereafter maintained that these regulations, which are effluent limitations, were issued under section 301. The Administrator advanced this position before the district court and court of appeals below.[6]

This reliance has jurisdictional significance. Section 509(b)(1)(E) confers jurisdiction on the courts of appeals over "the Administrator's action . . . in approving or promulgating any effluent limitation under section 301 . . ." Because the Administrator in fact acted under his alleged authority under section 301 and in fact promulgated "effluent limitations" thereunder, the court of appeals had jurisdiction to determine whether the Administrator's action was proper or improper. See *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1913). Amicus thus agrees with the conclusions of the Fourth and Tenth Circuits that a court need not reach the merits of the Administrator's action in order to decide the preliminary question of jurisdiction. *DuPont v. Train,* 528 F.2d 1136, 1141 (4th Cir. 1975); *American Petroleum Institute v. Train,* 526 F.2d 1343 (10th Cir. 1975). The court in the *American Petroleum Institute* case explained:

> API says that the court of appeals does not have jurisdiction because the Act does not author-

[6] *DuPont v. Train,* 383 F. Supp. 1244, 1250 (W.D. Va. 1974), *affirmed,* 528 F.2d 1136 (4th Cir. 1975).

ize the Administrator to promulgate § 301 regulations imposing effluent limitations on existing sources. The argument is beside the point because *the Administrator has not only claimed the power but also has acted to promulgate regulations under § 301.* Our present concern is with the jurisdiction of the court of appeals—not with the statutory authority of the Administrator.

. . . The validity or invalidity of [EPA's] action has no bearing on jurisdiction. *In the exercise of its statutory jurisdiction, the court determines whether the Administrator acted within his statutory authority. American Petroleum Institute v. Train,* 526 F.2d at 1345.

B. Original Jurisdiction Lies In The Courts Of Appeals Because Section 304(b) Is Incorporated By Section 301 Into Section 509 (b)(1)(E).

The Administrator also relies upon section 304(b) for the authority to issue these regulations. Section 304(b) is not expressly mentioned in section 509(b). However, Amicus submits that actions under section 304(b) are reviewable per se in the courts of appeals because the reference in section 509(b)(1)(E) to "the Administrator's action . . . in approving or promulgating any effluent limitation . . . under section 301" necessarily includes the major step of issuing guidelines under section 304(b). Section 301(b)(1)(A) requires the achievement of effluent limitations by 1977 "defined' by the Administrator pursuant to section 304(b) of this Act" and section 301(b)(2)(A) requires the achievement of effluent limitations by 1983 "in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act."

Thus the goals of section 301(b) are merely vague exhortations until the Administrator gives them pre-

cise meaning by issuing section 304(b) guidelines. The issuance of the guidelines is a major action, national in scope, taken to implement the goals of section 301. It is entirely appropriate for such important national action to be reviewed in the courts of appeals. Since section 509(b)(1)(E) provides for expeditious review of subsequent administrative actions based on the guidelines, Congress must have intended that there would be expeditious review of the guidelines themselves. That section 301 incorporates section 304 for the purposes of judicial review is the most logical reading of the Act.

C. The Promulgation Of Section 304(b) Guidelines Is A Major Regulatory Action Under The Permit Program And Therefore Is Reviewable In The Courts Of Appeals.

Section 509(b) was intended to provide for prompt review in the courts of appeals of all important actions taken by the Administrator in issuing regulations applied under the permit program, in addition to the issuance of the permits themselves. The issuance of section 304(b) guidelines is a significant action *in and of itself* because the Administrator must veto permits which are outside the section 304(b) guidelines. Section 402(d)(2)(B).[7]

Secondly, in cases where the Administrator himself is in charge of the permit program, the effluent limitations must comply with the command of section 301(b) to require the achievement of "best practicable" or "best available" technology *as defined by the guide-*

[7] The reference in section 402(d)(2)(B) is to the guidelines under section 304(b), as opposed to the general State permit program guidelines under section 304(h) which are applied to the permit program in section 402(c)(2).

lines. In both instances, the issuance of guidelines is an essential part of the Administrator's "action . . . under section 301." Moreover, since section 301 expressly incorporates the Administrator's action under section 304(b), it is logical to read section 509(b)(1)(E) as also incorporating the section 304(b) guidelines.

This interpretation of section 509(b)(1)(E) is confirmed by a review of the general scheme for judicial review established by Congress under the Act. Congress established a dichotomy between enforcement actions, which are brought in the district courts (§§ 309, 505), and review of the Administrator's regulatory actions under the permit program, which are brought in the courts of appeals under section 509(b)(1). Section 301(b) incorporates section 304(b), so the Administrator's action under the latter section should be reviewed in the courts of appeals under section 509(b)(1)(E). As the court of appeals below pointed out, "it is highly significant that the [congressional] committee reports [on the Act] make no mention of any division of judicial review" which would relegate review of the Administrator's guidelines to the district courts while new source performance standards are reviewed in the courts of appeals. *DuPont* v. *Train,* 528 F.2d at 1141 (4th Cir. 1975).

D. Because Section 306 New Source Performance Standards Must Be Reviewed In The Courts Of Appeals, Those Courts Also Have Pendant Jurisdiction To Review Section 304(b) Guidelines Issued Simultaneously With The Performance Standards.

The "effluent limitations guidelines" at issue here were promulgated simultaneously with new source performance standards under section 306 of the Act. 39 Fed. Reg. 9612 (March 12, 1974). These two sets of

regulations were issued simultaneously, apply to plants in the same point source category, and are based upon a single set of studies of the effluent treatment methods applicable to that category. The court of appeals had jurisdiction to review the new source performance standards under section 509(b)(1)(A). Because the issuance of those standards was so intimately related to the issuance of the "effluent limitations guidelines," the court of appeals also had pendant jurisdiction over these "effluent limitations guidelines."

This court has expressed its disapproval of bifurcated judicial review of closely-related agency actions. *Foti v. Immigration and Naturalization Service,* 375 U.S. 217 (1963). See also *Oljato Chapter of Navajo Tribe v. Train,* 515 F.2d 654, 660 (D.C. Cir. 1975); *Tomah-Mauston Broadcasting Co. v. FCC,* 306 F.2d 811 (D.C. Cir. 1962); Jaffe, *Judicial Control of Administrative Action,* at 158-59 (1965); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals,* 88 HARV. L. REV. 980, 999 (1975). Here, bifurcation would require two different courts to study essentially the same record and would pose the risk of inconsistent adjudication of essentially identical technical issues. The new source performance standards were based upon the same study which generated the regulations for existing sources. For most categories the limitations for existing point sources are identical to the new source performance standards for corresponding subcategories. The independent discussion of new source performance standards required less than four pages of the Administrator's Development Document for this category.[8] New source per-

[8] Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Major Inorganic Prod-

formance standards for the steel industry were developed on a similar basis.[9] Yet under a system of bifurcated review, the owner of an existing source which expanded after the publication of proposed new source performance standards would be forced to proceed both in the court of appeals (for its new operations) and the district court (for its old operations) in order to challenge the action of the Administrator.

The policy against bifurcation of review of administrative actions is itself reason to interpret section 301(b) as incorporating section 304(b) for the purposes of judicial review. *Foti, supra; Oljato, supra.* But aside from that approach, which Amicus favors, the court of appeals had pendant jurisdiction to review the "effluent limitations guidelines" in the same action in which it reviewed the related section 306 new source performance standard under jurisdiction conferred by section 509(b)(1)(A).

The test for pendant jurisdiction was liberalized by the Court in *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). In *Gibbs,* the Court explained that in a case where a court has jurisdiction over a federal claim but also is presented with a claim under state law, the federal claim must independently confer subject matter jurisdiction on the federal court. In addition, the state and federal claim must derive from a common nucleus of operative fact. The Court concluded:

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ucts Segment of the Inorganic Chemicals Manufacturing Point Source Category, EPA-440/1-74-007-a (March, 1974), pages 339-343 (Ex. R. 5918-5921).

[9] Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Steelmaking Segment of the Iron and Steel Manufacturing Point Source Category, EPA-440/1-74-024-a (June, 1974).

> But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole. 383 U.S. at 725. (emphasis in original.)

Here, it is obviously appropriate to review these closely-related regulations in a single judicial proceeding. Both sets of regulations are based on essentially the same factual record.

The doctrine of pendant jurisdiction applies with even more force to favor consolidation of claims which would otherwise be heard in different courts within the federal juricial system as is the case here. See *Florida Lime and Avocado Growers, Inc. v. Jacobsen,* 362 U.S. 73 (1960) and *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 380-81 (1959) (referring to the test for pendant jurisdiction established in *Hurn v. Oursler* [289 U.S. 238 (1933)], which was later superseded and liberalized in *Gibbs, supra.*)

In short, it is perfectly appropriate for these regulations to be reviewed together in the court of appeals under the doctrine of pendant jurisdiction. The same policy considerations which prompted that doctrine also underlie the policy expressed by the Court against bifurcation of review of administrative actions. The "effluent limitations guidelines" are so closely related to the new source performance standards issued simultaneously with them that under either theory both should be reviewed together in the court of appeals.

II.

SECTION 301 CONTAINS NO EXPRESS POWER TO ISSUE MANDATORY SINGLE-NUMBER EFFLUENT LIMITATIONS, AND POWER TO PERFORM SO IMPORTANT A FUNCTION SHOULD NOT BE IMPLIED.

Section 301 contains no express grant of power to the Administrator to promulgate effluent limitations of any sort, much less the power to issue inflexible single number effluent limitations controlling in all permits as claimed by the Administrator. Rather, what subsection 301(a) literally does is make unlawful any discharge which does not comply with "this section and sections 302, 306, 307, 318, 402, and 404 of this Act." Subsection 301(b) sets 1977 and 1983 deadlines for *achieving* various effluent limitations, but all of them, however, are *established* pursuant to other enumerated sections of the Act. For example, effluent limitations "established pursuant to any State law or regulations," (§ 301(b)(1)(C)), are promulgated by the several states, not by the Administrator. Effluent limitations implementing water quality standards, (§ 301(b)(1)(C)), are established under section 302, not section 301. Pre-treatment standards (referred to in §§ 301(b)(1)(A) and 301(b)(2)(A)) are established under section 307.

A comparison of section 301 with numerous other sections of the Act demonstrates that when Congress intended to require or empower the Administrator to establish limitations of any type Congress made the requirement or grant explicit.[10] The absence of ex-

[10] Sections 302(a), 303(b), 303(c), 306(b), 307(a), 307(b), 307(c) and 312(b)(1) explicitly require the Administrator to "establish effluent limitations" or to "publish" or "promulgate" limitations or standards. Sections 304(a)(1), 304(a)(2), 304(b), 304(c), 304(d), 304(f), 304(g), 304(h), 307(a)(1), 311(b)(2)(A), 311(b)(4), 311(j) and 403(c) explicitly require the Administrator to "publish," "issue," "promulgate" or "establish" guidelines, regulations, information, criteria or lists.

plicit language in section 301 indicates strongly that Congress did not intend the Administrator to promulgate limitations under section 301. Moreover, unlike the numerous other sections of the Act which do require and empower the Administrator's action, section 301 fails to outline any procedure, or time period or deadline, within which effluent limitations (as opposed to § 304(b) guidelines) should or must be established. It is inconceivable that, if Congress really did intend the Administrator to have the power to issue national single-number discharge limitations applicable to all existing point sources by regulation under section 301, it would leave the time and procedure therefore completely vague, while discharge limitations of limited applicability and much less import were by *explicit* statutory language made subject to strict timetables and procedures, e.g., sections 307(a)(2) and 307(b).

That the Administrator has no power under section 301 to issue single-number effluent limitations is wholly understandable in light of the history of the Act. The basic issue with respect to such power is whether the Act was intended to accomplish federal pre-emption of the authority of the several States over effluent limitations in specific permits. The Act was passed in 1972 in a context which has been largely ignored.

The story is to be found in the archives of the Court. In 1970 Congressman Reuss of Wisconsin suggested that the Rivers and Harbors Act of 1899, which

had been the keystone of regulation of physical encroachments into the navigable waters of the United States for 71 years, might conceivably be broad enough to be used as a vehicle for control of the discharge of pollutants into navigable waters. Adventitious efforts to so use the 1899 Act ran into vigorous resistance in the courts. An attempt was made by Presidential proclamation to legitimatize the extension of the 1899 Act to control pollution. In that proclamation the President purported on his own authority to set up a permit program under the 1899 Act, but that program was promptly stymied by the effect of a case in the District of Columbia District Court (*Kalur v. Resor,* 335 F. Supp. 1 D.D.C. 1971)) and a case in the Third Circuit (*United States v. Pennsylvania Industrial Chemical Corporation,* 329 F. Supp. 1118 (W.D. Pa. 1971) *reversed,* 461 F.2d 468 (3d Cir. 1972), *reversed in part,* 411 U.S. 655 (1973)).

In this context the Act was pushed through Congress as an amendment to the existing Water Pollution Control Act. The basic scheme of the Act, in the light of past history (and the explicit statutory language of the statute of which the Act was an amendment) was to create as the control mechanism for water pollution a permit program in terms of specific effluent limitations—a significant policy change from prior legislation which had focused on stream quality.

Under the Act the permit program was to be administered principally by the several States. The role of the federal government was to provide guidelines (under § 304) for the States to use in their permit programs. This statutory scheme recognized that the federal government was in a better position than any individual State to determine what constitutes "best

practicable" or "best available" technology throughout the United States. Finally, the federal government had the responsibility to establish New Source Performance Standards on a national basis to prevent forum shopping by industries.

One of the expressly stated principal policies of the Act is to preserve the primacy of the States in water pollution control:

> It is the policy of Congress to recognize, preserve, and protect the *primary* responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . .
> Section 101(b).

That policy was *not* changed by any provision of the Act.

The Congressional debates on the Act explain this affirmation of State primacy. Congressman Blatnik, Chairman of the House Public Works Committee, set forth the position of that Committee on the issue forcefully:

> An effective water pollution control program must have significant participation at the regional and local level. Your committee believes that the majority of the program must be handled at that level of government which is *sufficiently close to the problems* to recognize them and to determine what is best for the waterway and area concerned. Obviously, these local and regional efforts must be within the framework and goals set out by Congress. However, let us not kid ourselves that the Federal establishment operating by itself can implement an effective water quality program. *Unless we have meaningful local and State participation and not a Federal dictatorship, the*

program will founder on the rocks of the generally inflexible. Washington dictated approach. Local and State initiative will disappear. *Those with the most incentive to work for local, State, and regional water quality will be stifled by Federal rigidity. We must not let this happen. We must preserve this local and State initiative.* 118 Cong. Rec. 10206 (1972), 1 Leg. Hist. 355."

The historical perspective and the legislatively intended pre-eminent role of the States are in fundamental conflict with any contention that Congress intended by indirection or implication through section 301 to pre-empt for the federal authorities the power to set effluent limitations in permits. This is reinforced by a consideration of the overall logic and scheme of the Act. As stated by the Senate Committee on Public Works:

> Subsection (b) of this section [304] requires the Administrator, within one year after enactment, to publish *guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402.* These guidelines would identify what constituted the "best practical control technology currently available" and the "best available control measures and practices," and the degree of effluent reduction obtainable through the application of each. Thus, these guidelines would define the effluent limitations required by

[11] Additional recognition of the role of the States is found in the legislative history at 118 Cong. Rec. 10209, 10214, 10234 (1972), reprinted at pages 363, 377, 426-427 of the two-volume Committee Print entitled *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong. 1st Sess. (Committee Print 1973, herein "Leg. Hist.") 117 Cong. Rec. 38805 (1971), 2 Leg. Hist. 1272.

> the first and second phases of the program established under section 301. S. Rep. No. 92-414, 92d Cong., 1st Sess. 51 (1971); 2 Leg. Hist. 1469.

If it had been intended by Congress that the Administrator should establish the effluent limitations under section 301, there would have been no point in requiring the Administrator to "publish guidelines" for setting effluent limitations. It is incredible that the Administrator would be required publicly to instruct himself as to how to set effluent limitations. Obviously section 304 guidelines were intended to be addressed to the permit grantors, who were to set the effluent limitations in the section 402 permits. This interpretation is confirmed by a review of section 402(d)(2)(B), which empowers the Administrator to veto a State-issued permit which is "outside the *guidelines* . . ." of this Act.

In answering a question during Senate debate, Senator Muskie confirmed that individual effluent limitations were to be established under the section 402 permit process:

> Mr. Mathias. Does section 301(b)(2)(A) on page 76 contemplate that a State, or the Administrator if appropriate, might be able to *set the 1981 [now 1983] effluent limitations almost on an individual point source by point source basis?*
>
> Mr. Muskie. Section 301(b)(2)(A) as well as section 301(b)(1) *anticipate individual application of controls on point sources* through the procedures *under the permit program established under section 402.* 117 Cong. Rec. 38855 (1971), 2 Leg. Hist. 1391.

The establishment of effluent limitations by the permit grantor appropriately implements the overall

congressional policy. As stated by the Senate Committee:

> The program proposed by this Section [301] will be implemented through permits issued in Section 402. S. Rep. 92-414, 92d Cong. 1st Sess. 42 (1971); 2 Leg. Hist. 1460.

The Committee also indicated that the limitations would be established in the permit process rather than by regulations which fix rigid numbers for all point sources within a subcategory. The Committee stated that:

> . . . little has been done to identify for industry the exact meaning, on a plant-by-plant basis, of the equivalent of secondary treatment. *Through the permit program established under section 402, with the help of those States which have effective programs, the Administrator and the States can and should,* by mid-1983, *be able to apply specific effluent limitations for each industrial source.* S. Rep. No. 92-414, 92d Cong. 1st Sess. 44 (1971); 2 Leg. Hist. 1462.

In response to contentions of all segments of industry that specific effluent limitations for each plant are to be established not by the Administrator pursuant to section 301, but rather by the permit grantors under section 402 on an individual basis, the Administrator has argued that such an interpretation of the Act would be inconsistent with the supposed goal of "uniformity" of regulation. However, as noted by the Conference Committee:

> Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform

> as possible. The Administrator is expected to be *precise in his guidelines* under subsection (b) of this section [§ 304], so as to assure that *similar* point sources with *similar* characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet *similar* effluent limitations. S. Rep. No. 92-1236, 92d Cong. 2d Sess. 126 (1972); 1 Leg. Hist. 309.

Two things are to be noted from the quoted passage. First, the "uniformity" required by the Act is that *similar* point sources meet *similar* effluent limitations, not that all sources, like and unlike, meet identical limitations. The effluent limitations "*within* a given category or class" are to be "*similar*" and "as uniform *as possible,*" not the *same,* as would result from mechanical application by permit grantors of a single-number limitation etched in stone by the Administrator.[12] Second, this uniformity is to be the result of the requirement that the Administrator "be precise in his guidelines" under section 304(b), not of an expectation that he set rigid single-number limitations under section 301, with a mandate that they be mechanically applied in all permits.

By employing "precise" section 304(b) guidelines and section 304(b) factors, permit grantors would produce uniformity consistent with the Fifth Amendment.[13] This was to be achieved by assigning to each point source having similar section 304(b) character-

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[12] Webster defines the word "same" as resembling in every way and conforming in every respect, as opposed to its definition of "similar" which is defined as having characteristics in common. Webster's Third New International Dictionary (3d Ed. 1961).

[13] See *Natural Resources Defense Council v. EPA,* —— F.2d ——, 8 E.R.C. 1988, 1992 (2d Cir. 1976).

istics a similar numerical limitation from within the guideline "range." (See Part III, *infra.*)

If the Administrator had fulfilled the command of the Act under section 304(b), the section 304(b) guidelines would provide an opportunity for the required flexibility, account for differences between plants within a subcategory, and would at the same time constitute workable instructions to the permit grantors so that there would be uniformity of application among plants with similar characteristics. This is the uniformity contemplated by Congress and it is the natural result of properly drawn guidelines. The *intended* uniformity cannot be achieved under the Administrator's interpretation of section 301. His interpretation produces limitations which apply regardless of dissimilarities among point sources.

The Second Circuit in its recent decision in *NRDC v. EPA,* —— F.2d ——, 8 E.R.C. 1988, 1992 (2d Cir. 1976), a companion case to *Hooker Chemicals and Plastics Corp. et al v. Train,* —— F.2d ——, 8 E.R.C. 1961 (2d Cir. 1976), put its finger on the matter of the need for flexibility when it said, ". . . without variance flexibility, the program might well founder on the rocks of illegality." The word "variance" could well be omitted—the crucial point is that Congress chose to regulate through a permit program, and the permit program obviously must balance the needs and problems of individual point sources against the broad objectives of the Act in arriving at a constitutionally acceptable regulatory program. In interpreting the Act, the courts of appeals which have considered the matter have recognized that a cornerstone of the Act is the principal that flexibility lies in the per-

mit grantor's determinations. The opinions of the Third, Fourth, Seventh, Eighth and District of Columbia Circuits acknowledge the necessity and desirability of such flexibility.[14] Indeed, there is really no controversy on the subject since the Administrator has admitted during the course of his regulatory efforts that flexibility in the permit grantor is necessary.[15]

In light of the historical perspective, the intended primary role of the States and, most importantly, the overall logic and scheme of the Act, it is possible to understand what section 301 does and does not do. First, it establishes that water pollution is to be controlled by reference to "effluent limitations," rather than stream quality. Secondly, section 301 requires all sources to "achieve effluent limitations" (i.e., to meet permit requirements) that require application (for 1977) of "best practicable control technology currently

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[14] Third Circuit: *AISI v. EPA, supra,* 526 F.2d 1027, 1044-46 (3d Cir. 1975); Fourth Circuit: *DuPont v. Train,* —— F.2d ——, 8 E.R.C. 1718, 1722 (4th Cir. 1976); Seventh Circuit: *American Meat Institute v. EPA,* 526 F.2d 442, 449 (7th Cir. 1975); Eighth Circuit: *CPC International, Inc. v. Train,* 515 F. 2d 1032 (8th Cir. 1975); District of Columbia Circuit: *American Frozen Food Institute v. Train,* —— F.2d ——, 8 E.R.C. 1993, 2017-18 (D.C. Cir. 1976.

[15] "Section 304(b)(1)(B) of the Act provides for 'guidelines' to implement the uniform national standards of section 301(b)(1)(A). Thus, *Congress recognized that some flexibility was necessary in order to take into account the complexity of the industrial world with respect to the practicability of pollution control technology. In conformity with the Congressional intent and in recognition of the possible failure of these regulations to account for all factors bearing on the practicability of control technology,* it was concluded that *some provision was needed to authorize flexibility in the strict application of the limitations contained in the regulation where required by special circumstances applicable to individual dischargers.*" 39 Fed. Reg. 24117 (June 28, 1974).

available" and (for 1983) of "best available control technology economically achievable."

Section 301 sets forth the general goal for all permits under section 402 and establishes times for achievement of those goals. Section 304 guidelines are intended to be the principal expression of federal responsibility with reference to effluent limitations. The establishment by the permit grantor, rather than by a distant federal office, of the actual limitation numbers to control a given point source is the means by which Congress intended the policy of State primacy to be implemented in the Act.

The Administrator has asserted a power under section 301 to promulgate national, single-number effluent limitations which appear in the permit of each point source within a given industrial subcategory. If the Court should validate this usurpation of power to promulgate actual permit numbers, the intended role of the States in administering the Act will be destroyed. Such crucial power should not be implied "by a series of subtle inferences, rather than by reference to clear statutory language," as Judge Adams so cogently observed in his concurring opinion in *AISI v. EPA*, 526 F.2d 1027, 1073 (3d Cir. 1975).

Because of the extreme importance of the power claimed by the Administrator, Amicus urges that if the Court perceives in section 301 any implied grant of power to the Administrator, it recognize it not as the controlling power over permit numbers claimed by the Administrator but, at most, the power to promulgate base level numbers which define the lower limit of the range of guideline numbers required by section 304(b). If *any* power relating to effluent limitations is to be

implied from section 301, it must be a power which is compatible with the express mandate of Congress in section 304(b) rather than a power which would nullify section 304(b). The essential principles of flexibility and State primacy in the permit process are destroyed if the Administrator issues rigid, single-number effluent limitations. A power implied from section 301 should not be allowed to destroy the scheme of the Act.

III.

THE ADMINISTRATOR MUST ESTABLISH RANGES OF PERMISSIBLE EFFLUENT LIMITATIONS FOR CLASSES AND CATEGORIES OF EXISTING POINT SOURCES AS PART OF THE GUIDELINES REQUIRED BY SECTION 304(b) OF THE ACT.

Amicus submits that the Act requires that the "degree of effluent reduction attainable" be expressed in the section 304(b) guidelines as a permissible "range" of effluent limitations to be achieved by 1977 and 1983 by all plants. In establishing ranges, the Administrator must consider the factors enumerated in section 304(b) (age, economic impact, size, etc.). The effluent limitation within the range applicable to an individual point source is determined by the permit grantor under section 402 by taking into account the factors enumerated in section 304, in addition to other factors which likewise *must be specified* in the section 304(b) guidelines. The range concept is pivotal to the proper functioning of sections 301, 304 and 402 of the Act. The purpose of the permit program is to apply the section 304 guidelines to the specific characteristics of an individual point source to determine the precise effluent limitation which it must achieve. Congress did not intend that the permit grantor perfunctorily recopy into permits rigid single

number effluent limitations determined in Washington by the Administrator.

The purpose of requiring the Administrator to provide a range of effluent limitations is the same as the purpose in requiring him to specify factors: to allow the permit grantors to consider and give effect to the specific characteristics and circumstances of an existing point source. Such intent is underscored by Congress' treatment of new sources in section 306 of the Act. With respect to new sources, the Act provides for the establishment of new source performance *standards* rather than effluent limitation *guidelines* because it was felt new sources could be constructed to meet a given standard and would not be encumbered by the varying problems and circumstances of the older existing point sources. On the other hand, the congressional intent as to existing point sources has been completely thwarted by the Administrator's so-called "effluent limitations guidelines" which, by their failure to provide ranges and specify factors, actually give the permit grantor no guidance or flexibility whatever.

The key role of the range concept in the regulatory scheme is readily discernible from the Act's legislative history. Congress intended that the Administrator establish a range of 1977 values for "best practicable control technology currently available" for a category or class of point sources. The Senate Report explains:

> In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. . . .
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> * * *
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> The Administrator should establish the range of best practicable levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category. S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971); 2 Leg. Hist. 1468.

The summary of the Act prepared by Senator Muskie reiterates this intention:

> The Administrator should establish the range of best practicable levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category. 118 Cong. Rec. S16873 (daily ed., October 4, 1972); 1 Leg. Hist. 169 (summary of Act prepared by Senator Muskie).

Congress intended that the guidelines defining "best available" technology for 1983 also provide a range of values:

> . . . the Committee intends that effluent limitations be based upon application of best available technology as defined by the Administrator. In making the determination of "best available" the Committee expects the Administrator to apply the same principles involved in making the determination of best practicable as outlined above except that rather than the range of levels established in reference to the average of the best performers in an industrial category the range should at a minimum be referenced to the best performer in any industrial category. S. Rep. No. 92-414, 92d Cong., 1st Sess. 50 (1971); 2 Leg. Hist. 1468.

The range requirement was expressly recognized by the Third Circuit in *AISI v. EPA*, 526 F.2d 1027, 1046 (3d Cir. 1975). The court in that case held that Congress intended that a range of effluent limitations be established and on remand directed the Administra-

tor to develop a range in its regulations for the Iron and Steel Manufacturing Point Source Category. The court's concern was to resolve the congressional concern for uniformity with its desire for localized (State) discretion in considering plant characteristics when establishing effluent limitations for a particular plant. The Third Circuit held that any single-number section 301 effluent limitation[16] must represent a "base level" applicable to all plants within a category or subcategory, and that a range must be established as a basis for action by permit grantors in setting more stringent limitations as to any particular plant.

The view of the Third Circuit, which is consistent with the logic of the Act, is that under section 304(b) the Administrator must establish effluent limitation guidelines applicable to classes and categories of point sources in the following manner. The Administrator should first subcategorize each industry.[17] He then

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[16] Amicus submits that the Administrator has no power under section 301 to issue single-number effluent limitations. See Part II, *supra*.

[17] Subcategorization itself does not provide the necessary range inasmuch as the Administrator generally has subcategorized industry along process lines. The Third Circuit in addressing this subject stated:

> Finally, we disagree with the Administrator's contention that 'sub-categorization' provides a range. The Administrator's subcategorization merely divided the entire iron and steel making industry by means of the types of processes employed, and *it does not reflect any of the innumerable differences within the particular subcategories.* No guidance is given with respect to the remaining section 304(b) factors, such as age, costs and engineering aspects, which we previously concluded must be "specified" in order to guide the permit grantors in exercising their carefully circumscribed discretion in setting precise standards for individual point sources. 526 F.2d at 1046.

must apply the factors enumerated in section 304(b) to each subcategory to determine a base level of "best practicable control technology currently available" as well as establish a range of effluent limitations above the base level.[18] Both the range and base level are to be determined by studying the innumerable differences among plants within each subcategory. He must then specify in the guidelines the factors which the permit grantor must consider and which will accommodate those innumerable differences.

The precise effluent limitations applicable to an individual plant are to be determined in the section 402 permit program. In applying the guidelines to that plant, the permit grantor must take into account the section 304(b) factors to determine the level within the range where the plant falls. The Fourth Circuit recognized that the enumerated section 304(b) factors must be applied to a particular plant in addition to being considered when establishing the range when it stated:

> With regard to the 1977 step, the reference in §301(b)(2)(A) to "point sources" is taken to mean that Congress intended that the permit grantor should give individual attention to each "point source" and apply the factors specified in §304(b)(1)(B). *Some of those factors, e.g., "age* of equipment and facilities involved" can only be applied on an individual basis. EPA recognized this problem when it included variance provisions in its regulations for the 1977 step. *E. I. DuPont de Nemours & Company v. Train,* —— F.2d ——, 8 E.R.C. 1718, 1723 (4th Cir. 1976).

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[18] This general scheme must be repeated in order to develop guidelines defining "best available technology economically achievable" for 1983.

Amicus is mindful of Senator Muskie's assertion that the section 304(b) factors should not be considered on a plant-by-plant basis.[19] Amicus disagrees with that assertion because certain of the section 304(b) factors can be properly applied only on a plant-by-plant basis, as was recognized by the Fourth Circuit, *supra*.

The Third Circuit's interpretation of the Act as to the range concept under section 304 provides both the uniformity and flexibility required by the Act and intended by Congress. The Administrator has heretofore recognized the need for flexibility in its otherwise rigid effluent limitations and has attempted to provide that flexibility by means of a variance provision.

IV.

THE VARIANCE PROVISION FAILS TO PROVIDE FLEXIBILITY BECAUSE IT DOES NOT REQUIRE INDIVIDUAL APPLICATION OF THE SECTION 304(b) FACTORS IN THE PERMIT PROCESS.

No one disagrees that the Act requires flexibility to accomplish fundamental fairness in application. The question is whether the Administrator's "variance" provision does so in a manner consistent with the stated objectives of the Act.

The Administrator's proposal premises the grant of a variance on the existence of "fundamentally different" factors. 39 Fed. Reg. 9622 (March 12, 1974).

This identical provision was set aside and remanded in *AISI v. EPA*, 526 F.2d 1027, 1046 (3rd Cir. 1075), where the court said:

[19] See 118 Cong. Rec. S16873 (Daily ed., October 4, 1972); 1 Leg. Hist. 172.

> The Administrator contends that sufficient flexibility in the regulations is provided through the "variance" procedure, which allows individual discharges to obtain variances from the limitations upon a showing that the factors relevant to a particular point source are "*fundamentally different* from the factors considered in the establishment of the guidelines." Our responsibility, however, is not to determine whether the Administrator has provided for flexibility, but whether he has followed the statutory scheme established by Congress. Regardless of whether the establishment of a variance procedure is within the Administrator's discretion, we do not believe that the Administrator can ignore his obligation to promulgate guidelines specifying factors to be considered and ranges above a base level. We also note that the variance procedure provides for less flexibility than we believe Congress contemplated, since it permits deviations from otherwise rigid and unitary limitations only where the circumstances of the particular plant are "fundamentally different" than those from which the effluent limitation was derived. (Emphasis in original.)

If the Administrator had set a range of effluent limitations, effective consideration could be given in the permit granting process to the individual characteristics of each discharger. But within the announced variance scheme such characteristics will be given no effect whatever unless they are found to be "fundamentally different" from those considered by the Administrator in formulating his effluent limitations. The variance procedure fails to specify the criteria to which the permit grantor is supposed to refer. Applicants and permit grantors to this date have not been given any guidance by the Administrator on what is determinative.

The variance procedure is *not* a valid response to the congressional mandate of flexibility because: (1) "fundamentally different" requires something more than a determination by the permit grantor that a source falls somewhere within an applicable limitation range; and (2) there really is no flexibility, because one either gets a variance *or* is left with the rigid limitation—it is an all or nothing proposition. If the permit grantor were given proper guidelines containing a range of effluent limitations, he could apply the guidelines and the factors contained therein to determine the proper effluent limitations within the range for each discharger. A variance applicant using heaven knows what criteria must show he is "fundamentally different," or he will be left with a limitation with which he cannot comply.

Amicus agrees that the establishment of a variance procedure may be within the discretion of the Administrator as was held by the Second and Fourth Circuits.[20] This procedure, however, must be in addition to the section 304(b) range of effluent limitations. It cannot be a substitute for compliance with the Act.

THE STANDARD OF REVIEW

The questions presented herein require the Court to interpret an Act of Congress by using the Court's usual interpretative tools—logic, careful analysis, and the text and legislative history of the Act. Statutory interpretation has long been recognized as the particular domain of the courts. Chief Justice Marshall declared "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v.*

[20] *E. I. DuPont De Nemours v. Train*, —— F.2d ——, 8 ERC 1718 (4th Cir. 1976); *Natural Resources Defense Council, Inc. v. EPA*, —— F.2d ——, 8 E.R.C. 1988 (2d Cir. 1976).

Madison, 1 Cranch 137, 177 (1803). Although courts may give deference to administrative interpretations of their enabling statutes,[21] the duty of interpreting the law is, in the final analysis, a judicial duty, and courts have not hesitated to overule erroneous agency statutory interpretations.[22]

Judicial deference to the Administrator's statutory interpretation proffered here would be inappropriate for several reasons. First, the Administrator's *current* interpretation of the law is contrary to his *original* interpretation. On December 7, 1972, the Administrator testified before the House Committee on Public Works that the Act would require the issuance of section 304 (b) guidelines "for the purpose of assisting the states."[23] In the Administrator's initial announcement of procedures for adopting this sort of regulation he cited as authority section 304(b), but not section 301.[24]

Second, the Administrator's statutory interpretation is self-aggrandizing. He has arrogated to himself power which, Amicus submits, was reserved by Congress for the permit grantors.

Third, the Administrator's statutory interpretation encroaches upon State sovereignty. States with approved permit programs have received authority from their legislatures to issue permits setting effluent limitations. The Administrator has attempted to reduce

[21] See *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975) and *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965).

[22] *Wilderness Society v. Morton*, 479 F.2d 842, 864-66 (D.C. Cir. 1973), and cases cited therein.

[23] Hearings on H. R. 1896 Before the House Committee on Public Works, 92d Cong. 1st Sess. 300 (1972); 2 Leg. Hist. 1198.

[24] 38 *Fed. Reg.* 21202 (August 6, 1973).

that power to a mere ministerial function. In contrast the Act states that "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . ." Section 101(b). The Court should look with skepticism upon an agency interpretation of the Act which contravenes that express statutory policy.

Finally, the Administrator cannot claim that he is in a better position than this Court to interpret the relevant sections of the Act. The tools of statutory construction—logic, careful analysis, and the text and legislative history—are equally available to both. As the District of Columbia Circuit observed in *Wilderness Society v. Morton,* 479 F.2d 842, 866 (D.C. Cir. 1973) *cert. denied,* 411 U.S. 917 (1973):

> Perhaps the primary rationale behind the doctrine of deference is the idea of administrative expertise. Thus it has been said that special deference is due when the administrators were involved in the drafting and passage of the statutory language. . . "Administrative construction is less potent than it otherwise would be where it does not rest upon matters peculiarly within the administrator's field of expertise." (Citations omitted.)
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> There can be do doubt that there is no need for administrative expertise in resolving the question of the meaning of Section 28. Expertise might be needed to decide what is a reasonable pipeline construction area, but it is not needed to decide whether Section 28 precludes construction outside the statutory right-of-way.
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> "* * * [S]ince the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of

> the Secretary, but by judicial application of canons of statutory construction. * * * 'The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise. "[W]here the only or principal dispute relates to the meaning of the statutory term" . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert.' * * *"
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> Barlow v. Collins, 397 U.S. 159, 166, 90 S. Ct. 832, 837, 25 L. Ed. 2d 192 (1970), *quoting* Hardin v. Kentucky Utilities Co., 390 U.S. 1, 14, 88 S. Ct. 651, 19 L. Ed. 2d 787 (1968) (Mr. Justice Harlan, dissenting).

Here, as in *Wilderness Society* and *Barlow* v. *Collins,* the resolution of the issues presented turns on skills in which the Court, not the Administrator, is most expert. See *NLRB v. Brown,* 380 U.S. 278, 290-92 (1965); *National Petroleum Refiners Assn. v. FTC,* 482 F.2d 672, 694 (D.C. Cir. 1973).

CONCLUSION

For the foregoing reasons, the Court should affirm the holding below that jurisdiction to review the Administrator's action lies in the courts of appeals. The Court should reverse the Court of Appeals for the Fourth Circuit on the merits and declare that the Administrator does not have the power to issue single-number effluent limitations under section 301 of the Act. Finally, the Court should declare that the Administrator has failed to comply with the command of section 304(b) of the Act, which requires him to publish guidelines (1) establishing ranges of effluent limitations and (2) specifying the relevant factors which will enable the permit grantors to apply effluent limitations from the guideline ranges for a specific plant.

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